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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|-------------------------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiff/Respondent, |) | Supreme Court Docket No. 38203-2010 |
| |) | Jefferson County District Court No. |
| vs. |) | 2010-1385 |
| |) | |
| JOBY LEE HANNER, |) | |
| |) | |
| Appellant. |) | |
| _____ |) | |

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF
JEFFERSON

HONORABLE GREGORY W. MOELLER
District Judge

LAWRENCE WASDEN
Attorney General
State of Idaho
Attorney for
Plaintiff-Respondent

STEVAN H. THOMPSON
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Idaho Falls, Idaho 83405
Attorney for
Defendant-Appellant

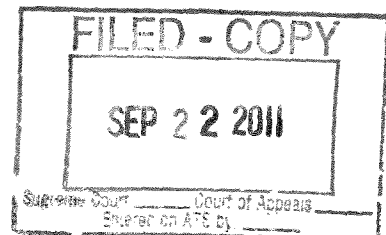


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STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a jury verdict dated July 9, 2010 in which the Appellant, Joby Hanner was convicted of the charge of Leaving the Scene of an Injury Accident in violation of Idaho Code §18-8007. The Court thereafter entered judgment and sentenced the Appellant to a unified term of five years with four years fixed and one year indeterminate period to follow. This was the maximum penalty provided by law. (R. Pg. 163)

The Appellant filed a timely notice of appeal and subsequent thereto filed an amended notice of appeal on November 12, 2010.¹ In addition thereto, a motion to reconsider his sentence pursuant to Rule 35 of the Idaho Criminal Rules was filed and heard by the Court on May 2, 2011. The District Court following hearing denied Defendant's Rule 35 Motion to Reconsider and then a second amended notice of appeal was filed to include the issue of the Court's denial of that motion to reconsider.

Appellant asks this Court to review this case to consider whether errors were committed during the course of the trial in which denied the Defendant his due process rights to a fair trial and a right to present a defense. Appellant also raises the issue regarding effective assistance of counsel in failing to make a proper record during the course of the trial, so the proper appeal from those issues could be raised before this Court.

An inquiry has been made with the Court reporter and counsel has been advised that the records which Appellant wishes to be made a part of the record do not exist, however a motion to augment the record is being filed herewith asking this Court to order that those portions of the record identified therein be transcribed or affidavit filed with the Court indicating that they do not

1. The clerk's record needs to be augmented to include this filing as it does not appear in the record prepared.

exist.

Statement of Facts and Course of Proceedings

A Jury trial was held on July 8 -9, 2010 and various witnesses testified on behalf of the State regarding the Criminal charge pending against the Defendant for Leaving the Scene of an Injury Accident. The victim Brenda Fullerton testified that on the night of April 7, 2010 at approximately 9:00 p.m. she was struck by the Appellant's vehicle as she returned to it after parking to enter the Post Office. (Tr. Pg. 29-38) She testified that in her opinion the driver of the vehicle should have been able to see her and be aware that he hit her based on the lighting conditions and the fact that the headlights of the vehicle were shining directly on her. Id

Ms. Fullerton did however testify that it was the back end of the vehicle that fishtailed and hit her. (Tr. Pg. 32) The fact that the vehicle was fishtailing and the backend struck the victim was confirmed by other State's witnesses. (Tr. Pg. 20) The Appellant admitted being the driver of the vehicle, but denied any knowledge that he had actually struck someone as he left the parking lot of the Maverick store where the incident occurred. (Tr. Pg. 47, 52, 95-99, 102-104).

The Appellant's girlfriend was with him in the vehicle at the time of the accident, but never called as a witness. (Tr. Pg. 6, 7) The fact that she was not called as a witness by defense counsel is raised by Appellant's Amended Notice of Appeal filed November 12, 2011.

Appellant is requesting that the Clerk's Record be augmented with this Pro Se filing made subsequent to the completion of the original record. Appellant contends that his girlfriend Jessica Simmons if allowed to testify would have confirmed that neither she nor Mr. Hanner were aware that the victim Ms. Fullerton had been struck by their vehicle as it passed by. There is no record of any attempt to call Ms. Simmons as a witness, but Appellant alleges he was advised by trial counsel that he could not call her as a witness and that the Court would not allow counsel to

make reference to her. There appears to be some support for this in the record as the Court interrupted the testimony of Officer Aaron Williams when he began to mention the “girlfriend” and a discussion was had off the record. (Tr. Pg. 47, 48) Appellant alleges ineffective assistance of counsel in not calling her as a defense witness and /or not making a record of the Court’s ruling with respect to this witness.

Appellant further raises the issue as whether his right to a fair trial was violated by the State’s failure to preserve evidence in the form of tape recorded interviews of the Defendant. (Tr. Pg.80) Appellant argues he received ineffective assistance of counsel in failure to properly investigate this issue prior to trial and discussing with Appellant the need to pursue protecting this evidence before it was lost.

ISSUES

- I. There was insufficient evidence to support the Jury's Verdict.
- II. The Court erred in failing to instruct the jury on the lesser included offense of reckless driving.
- III. The Defendant's right to a fair trial was prejudiced by the State's Failure to preserve evidence.
- IV. The sentence imposed by the Court was excessive

ARGUMENT

I.

There was insufficient evidence to support the Jury's Verdict.

Appellant asserts there was insufficient evidence presented at trial to support a conviction on the charge of Leaving the Scene of an Injury Accident. The testimony of all State's witnesses established that it was the back-end of the Defendant's vehicle that struck the victim Brenda Fullerton. (Tr. Pgs. 18-25, 3-16, 29-39) The Defendant testified that he was not aware he had struck her or else he would have stopped. There is no doubt from the record that he saw her, but there is certainly a reasonable doubt as to whether he knew or reasonably should have known that he actually struck her. (Tr. Pgs. 95, 96)

There were two reasonable interpretations of the facts, with one pointing to guilt and one pointing to innocence. Although the Courts have held that a "holder" instruction should no longer be given it's certainly would have been appropriate for counsel to argue and for this Court to consider whether there was sufficient evidence to support a finding of guilt. State v. Humphries, 134 Idaho 657 (2000).

In addition, it was prejudicial to the Defendant and created confusion to the jury for the investigating Officer Aaron Williams to be asked if the Defendant's statement regarding knowledge of hitting the victim was contradicted by his girlfriend and then be cut-off by the Court regarding any further direct or cross –examination. (Tr. Pg. 47) As indicated the Appellant asserts as part of this issue that his right to a fair trial was denied by not being allowed to mention his girlfriend Jessica Simmons or call her as a witness.

II.

The Court erred in failing to instruct the jury on the lesser included offense of reckless driving.

The court erred in failing to instruct the jury and give them the opportunity to deliberate regarding a lesser included offense of Reckless Driving. Counsel for the Defendant submitted a proposed jury instruction as to that lesser included offense of Reckless Driving. (R. Pg. 72) Idaho Code § 19-2132(b) states as follows:

- (b) the Court shall instruct the jury with respect to the lesser included offense if:
 - (1) either party requests such an instruction; and
 - (2) there is a reasonable view of the evidence presented in the case that would support a finding that the Defendant committed such lesser included offense but did not commit the greater offense.

A reasonable view of the evidence presented in the case would support the Court giving such lesser included offense and it was requested by the Defendant. The Defendant himself testified that he was not aware and had no actual knowledge that he had struck the victim, Brenda Fullerton. The witnesses who testified for the State all indicated and verified that it was the rear-end of the Defendant's vehicle that struck the victim and therefore it is a reasonable interpretation of the evidence that the Defendant did not know and reasonably would not have known under the circumstances that he had struck her as he passed.

There was no evidence presented that the Defendant had actual knowledge of striking the victim and the State's case was entirely based upon the theory that under the circumstances he reasonably should have known. The jury's verdict had to be based entirely upon the Court's instructing them that they must find beyond a reasonable doubt that he either knew "or reasonably should have known under the circumstances" that she had been struck and injured. There were no other issues in dispute in the case as the Defendant acknowledged all of the other

elements of the offense. If the jury had been allowed to deliberate and given the opportunity to consider the lesser included offense of Reckless Driving, they may very well have agreed with the Defendant and found him guilty of only that charge of Reckless Driving.

III.

The Defendant's right to a fair trial was prejudiced by the State's failure to preserve evidence.

The Defendant alleges that his right to a fair trial was violated by the State's failure to preserve and ensure that a tape recording of his interview with Officer Aaron Williams was safeguarded. The State acknowledged during the course of the trial that the tape recording of that interview was not preserved and was recorded over by with other matters. (Tr. Pg. 80) The Defendant asserts that his attorney should have pursued this issue sooner and learned of the destruction of that evidence. The police reports summarizing that interview were contradictory to what the Defendant asserts was actually said during the course of his discussion with Officer Williams and would have been reflected on the tape recording.

In the United States Supreme Court *Brady v. Maryland*, 371 US 812, 83 S.Ct. 56 (1962) set forth that the State's obligation to disclose exculpatory evidence and as part of that requirement also encompasses the State's duty to preserve evidence. In the record it appears that counsel did request a delay of the trial to allow an opportunity to review that tape and presumable compare it with what was contained in the written police report. (Tr. Pg. 79) It would seem from the record on its face that this is too late in the game for preparation for cross-examination and it is apparent that counsel was aware that a tape recording may exist but had not followed up on that issue previously. A decision was apparently made to not recall Officer Williams and cross-examine him with respect to that interview when it was learned that the tape

recording had been destroyed. The only defense witness that was presented at that point was the Defendant and there was no attempt to address the issue further.

IV.

The sentence imposed by the District Court was excessive and an abuse of Discretion given all the facts and circumstances.

The standard review is for this Court to determine whether or not the District Court abused its discretion in the sentence imposed. *State v. Toohill*, 103 Idaho 568, 650 P.2d 707 (Ct. App. 1982); *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989). As the court stated in *State v. McDougall*, 113 Idaho 900, 749 P. 2d 1025 (Ct. App. 1988):

A sentence may represent a clear abuse of discretion if it is unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 645 P.2d. 323 (1982). Our standard of reasonableness as set forth in *Toohill* is well-known and need not be repeated here. It suffices to say that ordinarily we juxtapose the nature of the offense and the character of the offender, *State v. Reinke*, 103 Idaho 771, 653 P.2d. 11 (Ct. App. 1982), with the goals of protecting society, deterring criminal activity, rehabilitation of the Defendant, and punishment for retribution.@ See *State v. Toohill*, supra. *McDougall* at 905.

The Court in *Toohill* went on to define a reasonable sentencing as:

We hold that a term of confinement is reasonable to the extent that it appears necessary, at the time of the sentencing, to accomplish a primary objective protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Toohill*, Id at 568.

Idaho Code § 19-2521, states that the court shall deal with the person who has been convicted of a crime without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the Defendant,

it is of the opinion that imprisonment is necessary for protection of the public under certain criteria specified in the statute. The statute also sets forth the factors for the Court to consider which weigh against a sentence of incarceration.

A sentence of the maximum allowed of five years with four fixed and one indeterminate to follow was excessive under all the facts and circumstances of this case. The State's recommendation is for a five year sentence with three years fixed and two years indeterminate to follow. Counsel for the Defendant argued that Mr. Hanner would benefit from participation in specialty court specifically the Wood Pilot Project and application had been made for his entry to that program.

This is a case where it's apparent from the evidence that the Defendant certainly did not intend the harm that resulted from his driving behavior. He took full responsibility for the fact that he was driving carelessly but had no intent to harm Ms. Fullerton and believed in fact that he had not struck her with his vehicle.

Upon learning that Ms. Fullerton had been injured, Mr. Hanner contacted law enforcement and turned himself in on this charge. He cooperated with law enforcement in acknowledging that he was the driver of the vehicle when they otherwise would have had to put on proof in that regard and spend additional time investigating the matter had he not taken responsibility.

Although Mr. Hanner had a prior criminal history, he had been discharged from parole four years earlier and in fact had received an early discharge based upon his good behavior. (Tr. Pg. 123) As indicated, he had applied for and had been accepted into the Wood Pilot Project a specialty court program and it was represented that he had been clean from any controlled substance issues other than alcohol for at least three years. (Tr. Pg. 125)

He expressed extreme remorse for the injuries caused to Ms. Fullerton and had written numerous letters to her and to the court expressing his remorse and offers to assist her financially in paying restitution.

The District Court erred and was an abuse of discretion not to give consideration to and allow the Defendant's participation in that specialty court. It would have allowed him the opportunity to continue working and being in a better position financially to pay restitution and assist the victim in that regard.

CONCLUSION

The Defendant asks this Court to reverse his conviction and grant a new trial based upon errors that he asserts were committed during the course of his trial. Appellant asserts that a reasonable interpretation of the evidence would have supported the Court instructing the jury that they had the option of considering a lesser included offense of Reckless Driving. The failure to do so led the jury to only one conclusion in finding him guilty rather than being given other alternatives.

The Defendant asserts that there was an important witness that was not called to testify during the trial. It's clear from the record that there was another occupant in the vehicle with the Defendant at the time of the incident and there was some reference to a "girlfriend" by one of the State's witnesses. That testimony was cut off and no further explanation given to the jury as to why she did not testify. Defendant asserts that had she testified, she would have presented exculpatory testimony and that along with the tape recording of his interview with Officer Williams which was destroyed, would have made a difference to the jury in how they viewed the evidence. There is no reasonable explanation in the record as to why this witness did not testify and/or why the tape recorded interview was not preserved.

On that basis, the Defendant requests a new trial so that all the evidence can be fairly presented and the jury given opportunity to consider a lesser included offense.

Finally, the Defendant asks this Court to review the sentence imposed by the Court and argues that it was excessive under all the facts and circumstances and abusive discretion for the Court to impose a maximum penalty provided by law.

Respectfully Submitted by:



STEVAN H. THOMPSON, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 21 day of September, 2011, I served a true and correct copy of the following-described document on the parties listed below, by mailing or by facsimile, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED:

BRIEF OF APPELLANT

PARTIES SERVED:

| | |
|-------------------------|------------|
| LAWRENCE WASDEN, ESQ. | () Mailed |
| Deputy Attorney General | () Faxed |
| Criminal Law Division | |
| P.O. Box 83720 | |
| Boise, ID 83720-0010 | |


STEVAN H. THOMPSON, ESQ.